

19 July 2024

Ms Alison Marchant MP
Chair
Legislative Assembly Economy and Infrastructure Committee
Parliament House
Spring Street
EAST MELBOURNE VIC 3002



By email: eic.assembly@parliament.vic.gov.au

Dear Ms Marchant,

Submission to the Inquiry into workplace surveillance

Thank you for the opportunity to provide evidence to the Legislative Assembly Economy and Infrastructure Committee's Inquiry into workplace surveillance.

The Victorian Farmers Federation (VFF) is the voice of the state's agricultural industry and directly represents farm business owners and their families. The issues surrounding workplace surveillance are important to the farming community, particularly given the targeting of farm businesses by animal activists who unlawfully trespass on farms and undertake surveillance of farming operations. The issues are also important in the context of the rights of farmers and their workers in the face of calls on the government to impose surveillance on farm businesses for the purpose of monitoring animal welfare compliance.

This submission notes the impact of unlawful surveillance on farm businesses and issues pertaining to the *Surveillance Devices Act 1999* which have led to the inability for law enforcement to stop the unlawful activities of animal activists. It discusses what factors need to be considered in reforming the Act in order to better deter trespass on farms. This submission also discusses the importance of protecting the privacy of farmers and their workers in the context of any potential scheme that would seek to impose mandatory government surveillance on private property connected to the purpose of animal welfare laws.

Impact of animal activist trespass and surveillance

Privacy violations: activists trespassing on farms and recording without permission directly violate farmers' privacy. These recordings often capture private operations and personal activities, including sensitive and personal aspects of the farmers' lives and businesses, which they do not intend to be publicly disclosed. Such violations can lead to a sense of insecurity and mistrust among farmers, undermining their right to conduct business privately.

Economic impact: negative publicity resulting from the unauthorised release of recordings can damage the reputation of farming businesses, and the industry as a whole. Activist videos often portray farms in a negative light, regardless of the context or accuracy of the footage. This can lead to reduced consumer trust, loss of business opportunities, and financial instability. Farms may face boycotts or other economic sanctions driven by misinformed public opinion.

Security risks: publicising detailed information about farm layouts and operations exposes farms to potential security threats. Activists may inadvertently provide criminals with valuable information that could be used for theft, vandalism, or other malicious activities. Farmers may need to invest in additional security measures, increasing operational costs and creating an atmosphere of fear and vigilance.

Biosecurity risks: trespass onto farms to undertake surveillance creates risks to animal health and welfare with animal activists disregarding biosecurity protocols.

Mental health impact: the stress and anxiety resulting from unauthorised surveillance and exposure takes a toll on the mental health of farmers, their families and staff. Continuous worry about being watched or misrepresented adds to the pressures of running a farm. It is well documented that this leads to burnout, depression, and other mental health issues, affecting the overall well-being and productivity of farmers.

Animal activist trespass and surveillance

The *Surveillance Devices Act 1999* prohibits the knowing installation, use or maintenance by a person of an optical surveillance device to record a "private activity" to which the person is not a party. A "private activity" is defined to be "an activity carried on in circumstances that may reasonably be taken to indicate that the parties to it desire it to be observed only by themselves", with certain exceptions. The Act also provides, by s 11(1), that, subject to sub-s (2), "a person must not knowingly communicate or publish a record or report of a private conversation or private activity that has been made as a direct or indirect result of the use of ... an optical surveillance device". By sub-s (2)(b)(i), sub-s (1) does not apply to a communication or publication that is no more than is reasonably necessary "in the public interest".

It is clear that the activities undertaken by animal activists in entering farm properties without the knowledge or consent of the owner and undertaking surveillance of lawful farming operations constitute breaches of s 7(1) of the Act. Nevertheless, the application of the law is

limited by difficulties in being able to bring charges against individuals as law enforcement may not be able to ascertain the identities of those individuals as a) they may not appear in the footage they have taken; or b) their identity is concealed in the footage.

In such circumstances, the Act seeks to further mitigate the unlawful behaviour through the provision of s11(1) which prohibits the publishing of unlawfully obtained footage. In this case it is easier to ascertain the identity of publishers of such material where they are done so through social media, or where the broadcast media disseminates the footage. However, the broad application of the public interest exemption provided by sub-s (2)(b)(i) limits the potential for the successful prosecution of animal activists under sub-s (1).

Public interest

The question as to whether animal activists have the right to trespass and undertake surveillance of lawful farm activities was considered by the High Court in *Farm Transparency International Ltd v New South Wales* [2022]. This case concerned sections 11 and 12 of the *Surveillance Devices Act 2007* (NSW): section 11 prohibits the publication or communication of footage or photographs of “private activities”, including intensive farming and slaughtering operations, with penalties of up to five years in prison. Section 12 criminalises the possession of such recordings.

In 2015, Farm Transparency Project’s director was charged with publishing footage and photos depicting lawful practices at piggeries. Farm Transparency took legal action arguing that the NSW Act was in breach of the “freedom of political communication,” implicitly protected by the Australian Constitution.

Ultimately the High Court held that while the legislation did burden political communication, it also has a legitimate purpose of privacy. They also held that the offence provisions were proportionate to that purpose. According to three of the majority judges (Gordon, Edelman and Steward JJ), the ruling only applied to where the Act prohibited the publication and possession of recordings by those who were complicit in a trespass (as the individual and Farm Transparency International were), and not to third party publishers who were not complicit in the trespass. This is because no third-party publisher brought a case for the High Court to consider. Two of the judges (Kiefel CJ and Keane J) in the majority would have extended the ruling to third party publishers who were not complicit in the trespass, but who, as required by sections 11 and 12, knew, or were reckless to the fact that the recordings were obtained by trespass.

The High Court noted that the NSW Act did not contain the same public interest exception as the Victorian and other states’ Acts. Its judgement nevertheless considered the importance of mitigating trespass considering balancing that offence with the right to expose material in the public interest:

It may also be accepted that a purpose of s 8 of the SD Act is to prevent or deter trespassory conduct. Sections 11 and 12 further that purpose. To make those provisions subject to a public interest exception would be inconsistent with the achievement of that purpose since the exception is likely to have the effect of encouraging persons to unlawfully enter agricultural land to conduct surveillance of activities on it. The observation of a cross-agency working group

of the New South Wales Government, in not recommending that a public interest exception be made to the SD Act52, was plainly correct.¹

Given this logic, the VFF contends that footage of lawful practices on farms, which has been obtained unlawfully and that is subsequently used to misrepresent the conduct of a business, or misrepresent the ordinary lawful practices of an industry, cannot be in the public interest. The spread of misinformation to achieve a political objective, when that information has been obtained through impinging on other peoples' rights, should not be accepted as meeting the threshold for being in the public interest.

This is a distinct issue from that where whistleblowers expose unlawful conduct within a farm business. For example, if a farm worker were to expose the unlawful abuse of animals in a business, it is reasonable that they be afforded protection under the law for exposing a crime.

This leads to consideration as to what constitutes a whistleblower activity given that many animal activists claim they are whistleblowers and that the protections often afforded to whistleblowers under the law should be extended to their activities. In response, it must be made clear that whistleblowers are people who expose or bring to public attention an irregularity or a crime, from within an organisation. Whistleblowers come about the information they disclose more often because they have been made privy to that information within their organisation. In some form, they have a right to that information. They do not seek to infringe upon other people's rights to obtain the information. They disclose the information with the objective of preventing further crimes from being committed. Animal activists on the other hand do not have a right to access information, access that information through the act of trespass, and then share information of what are lawful activities for political ends.

Legal reform

To effectively deter animal activists from trespassing on farms, the *Surveillance Devices Act* should be reformed to address the specific challenges posed by unlawful surveillance and trespass. Firstly, the Act should explicitly clarify that where there is an act of trespass to undertake unauthorised surveillance, even if it is claimed to be in the public interest, such an act would constitute a breach. The public interest exemption should be narrowly defined to exclude instances where footage is obtained through trespass with the intent to misrepresent lawful activities.

Secondly, law enforcement should be granted enhanced powers to identify and prosecute individuals who unlawfully record or publish such footage, including provisions for technological and investigative support to unmask the identities of trespassers.

Additionally, penalties for both the unauthorised recording and the subsequent dissemination of such footage should be significantly increased to serve as a more effective deterrent. By implementing these reforms, the Act would better protect farm businesses from the disruptive and harmful actions of animal activists, while still upholding the rights of genuine whistleblowers to expose actual unlawful conduct. Lastly, the Act should provide clarification

¹ *Farm Transparency International Ltd v New South Wales* (2022) HCA 23 at 53.

on the use of drones as surveillance devices and ensure that relevant offences are extended to their unlawful use over farmland.

Mandatory surveillance

The secondary issue which Victorian farmers are concerned about pertains to calls from animal activists on the government to impose mandatory surveillance on farm business to monitor compliance with animal welfare laws. No case has been made to suggest that non-compliance with animal welfare laws necessitate the need for such an abridgment of rights. Whilst the Parliamentary Inquiry into pig welfare recommended 'that the Victorian Government impose mandatory closed-circuit television in all processing and farming facilities to be made available to regulatory bodies for independent audit(s),' this recommendation was made with complete disregard of the need to balance the rights of interested parties. This was noted by the VFF in the public hearings:

There are many industries that do not have mandatory CCTV footage in place, despite there being particular vulnerabilities, that is live streamed to the public for multitudes of reasons, including protecting the privacy of people who work in those establishments.²

The VFF believes any move to enforce such a regime would have the following impacts which must be considered:

- The introduction of mandatory surveillance on farms would constitute a severe invasion of privacy. Farms are not just places of work but also homes for many farmers and their families. Continuous surveillance infringes upon their right to privacy, creating an environment of constant observation and scrutiny.
- Farm workers, like all employees, are entitled to a reasonable expectation of privacy in their workplace. Mandatory surveillance imposed by government would undermine this right, potentially leading to a decline in worker morale and productivity. It could also result in challenges in attracting and retaining farm labour, as workers may be deterred by the invasive monitoring practices.
- The stress and pressure of being constantly monitored can have detrimental effects on the mental health and well-being of farmers, their families and workers. Farming is already a demanding and high-pressure occupation, and additional stressors would lead to increased mental health issues within the farming community.
- Mandatory surveillance implies a lack of trust in farmers' ability to manage their own operations and comply with animal welfare standards. This top-down approach would undermine the autonomy and professionalism of farmers, who are committed to the well-being of their animals and the sustainability of their practices.

² Emma Germano, President, Victorian Farmers Federation, Inquiry into pig welfare in Victoria, public hearing, Melbourne, 13 March 2014, Transcript of evidence, p. 62.

Conclusion

The VFF emphasises the critical importance of addressing workplace surveillance issues within the agricultural sector. Unlawful trespassing and surveillance by animal activists pose significant challenges to farm businesses, impacting both operations and privacy. The current limitations of the *Surveillance Devices Act* hinder effective law enforcement action against these unlawful activities. This submission calls for careful consideration of reforms to the Act to better deter trespass and protect the privacy rights of farmers and their workers.

Moreover, any proposed mandatory government surveillance for monitoring animal welfare compliance must balance the need for animal welfare with the fundamental rights of privacy for those within the farming community.

We would welcome the opportunity to speak more directly to these issues by participating in public hearings for the Inquiry.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Emma Germano', written in a cursive style.

Emma Germano

President

Victorian Farmers Federation